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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL ANTHONY CASTRELLON, Defendant and Appellant.	E065592 (Super.Ct.No. FVA1301796) OPINION

APPEAL from the Superior Court of San Bernardino County. Mary E. Fuller, Judge. Affirmed in part, reversed in part, and remanded with directions.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Scott C. Taylor, Charles C. Ragland and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

In 2005, a man was shot and killed at an apartment complex in Rialto. In 2013, a professed eyewitness came forward and identified defendant Michael Anthony Castrellon as the killer. She told the police and testified at trial that the victim tried to buy marijuana from defendant; defendant accused the victim of killing one of his "homeboys," then shot him.

A jury found defendant guilty of first degree murder (Pen. Code, §§ 187, subd. (a), 189), with an enhancement for personally and intentionally discharging a firearm, causing death (Pen. Code, § 12022.53, subd. (d)). He was sentenced to a total of 50 years to life in prison, along with the usual fines, fees, and miscellaneous sentencing orders.

Defendant's only claim of error is that his trial counsel rendered ineffective assistance by failing to request an instruction that evidence of provocation can reduce what would otherwise be first degree murder to second degree murder. We conclude that there was insufficient evidence of provocation to authorize such an instruction, and, in any event, the absence of such an instruction was not prejudicial. Hence, we will affirm.

I

FACTUAL BACKGROUND

On May 30, 2005, around 9:30 p.m., a police officer responding to a "shots fired" call found the dead body of Bruno Boschetti. It was in a walkway between building 1442 and building 1452 of the Winchester Apartments in Rialto. Boschetti had been hit by four bullets — one in the left arm, two in the back of the right leg, and one in the back.

Shantavia McDaniels testified that, one night in 2005, she and her friend, Raynelle, were hanging out outside the Winchester Apartments. A young Hispanic man came up and asked where he could buy some marijuana. She led the man up an alley to defendant, a marijuana dealer whom she knew as "Bugsy."

Defendant looked at the man and said, "Do you remember me?" The man said no. Defendant then accused the man of killing one of his "homeboys."[1] The man said, "I don't know what you're talking about," "[i]t wasn't me." Defendant accused the man "more than once"; the man denied it "more than once." This conversation lasted "[n]ot long. Maybe a couple minutes."

Defendant then pulled a gun out of the pocket of his hoodie. He dropped it, but he pulled out a second gun. He fired four or five shots. At some point — McDaniels was not sure whether it was before or after defendant started shooting — the man started running. She saw him fall in the walkway between building 1442 and building 1452.

When the shooting stopped, McDaniels ran to her apartment. She did not contact the police because "things happen" to snitches, and she had children to be concerned about.

McDaniels testified that the victim was wearing a t-shirt and jeans. Photos of the body were admitted into evidence. They have not been transmitted to us, but according

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[1] McDaniels initially testified that defendant said, "[O]ne of [your] homeboys killed one of [my] homeboys." However, when the prosecutor asked, "So [defendant] was accusing the male Hispanic of killing one of [defendant]'s homeboys, correct?," she answered, "Yes."

to defense counsel's closing, they showed the victim dressed in a "wife-beater" and khaki pants.

In August 2013, a police officer interviewed McDaniels about a number of cold cases. At the time, she was in prison because she had pleaded guilty to robbery in Los Angeles County and was serving a five-year sentence. She told him that "Bugsy" shot and killed "a Hispanic guy" at the Winchester Apartments. She identified a photo of defendant as Bugsy.

McDaniels told the officer that her friend Raynelle was with her when the shooting started. At trial, however, she did not remember whether Raynelle was with her.

She also told the officer that the victim was shot in the back of the head. At trial, she said she did not actually see where he was shot. Rather, "[a] few people" told her he was shot in the head.

The officer who interviewed McDaniels offered to tell the prosecutor in her case "how cooperative she's been." However, she never gave him the prosecutor's name, so he never actually did so. Otherwise, she had not been promised any benefit in exchange for her testimony.

Both before and after the 2013 interview, McDaniels had written letters to the Los Angeles court in an effort to get a modification of her sentence. However, none of these letters mentioned her cooperation in this case. At the time of trial, she was still in custody but in a reentry program.

Raynelle Ramirez testified that as of 2005, she lived in the Winchester Apartments and she was friends with McDaniels. However, she denied seeing any shooting. As of 2005, she was selling drugs, including marijuana. Thus, if someone had come up to her asking to buy marijuana, she would not have directed them to another seller. She knew defendant as Bugsy; he used to clean up for the manager at the Winchester Apartments. She did not remember him having a gun or selling marijuana.

II

FAILURE TO REQUEST AN INSTRUCTION THAT PROVOCATION CAN REDUCE FIRST DEGREE MURDER TO SECOND DEGREE MURDER

Defendant asserts that his trial counsel rendered ineffective assistance by failing to request an instruction that provocation can reduce first degree murder to second degree murder.

A. *Additional Factual and Procedural Background*.

During an instructions conference, defense counsel requested CALCRIM No. 570, concerning voluntary manslaughter on a heat of passion theory. The prosecutor objected that there was insufficient evidence of provocation. The trial court agreed; it therefore declined to instruct on voluntary manslaughter. Defendant does not claim that this was error.

Defense counsel did not request CALCRIM No. 522, which, as relevant here, would have stated: "Provocation may reduce a murder from first degree to second degree. . . . [¶] If you conclude that the defendant committed murder but was provoked,

consider the provocation in deciding whether the crime was first or second degree murder."

The trial court did give the standard first degree murder instruction (CALCRIM No. 521), which stated: "The defendant is guilty of first-degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. [¶] The defendant acted willfully if he intended to kill. The defendant acted deliberately if . . . he carefully weighed the considerations . . . for and against his choice and knowing the consequences decided to kill. [¶] The defendant acted with premeditation if he decided to kill before completing the act that caused death."

B. *Discussion*.

In the law of homicide, provocation plays two different roles.

First, it may reduce what might otherwise be murder to manslaughter. "A person who kills without malice does not commit murder. Heat of passion . . . precludes the formation of malice and reduces an unlawful killing from murder to manslaughter. . . . Heat of passion . . . is a state of mind caused by legally sufficient provocation that causes a person to act, not out of rational thought but out of unconsidered reaction to the provocation." (*People v. Beltran* (2013) 56 Cal.4th 935, 942.) "[T]he passion aroused need not be anger or rage, but can be any '"'[v]iolent, intense, high-wrought or enthusiastic emotion'"' [citation] other than revenge [citation]." (*People v. Breverman* (1998) 19 Cal.4th 142, 163.)

When used for this purpose, the provocation must meet an objective test: "The provocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment." (*People v. Lee* (1999) 20 Cal.4th 47, 60.)

Second, provocation may reduce what might otherwise be first degree murder to manslaughter. Subject to exceptions not applicable here, first degree murder requires premeditation and deliberation. (Pen. Code, § 189; *People v. Delgado* (2017) 2 Cal.5th 544, 571.) "[T]he '"existence of provocation . . . may . . . raise a reasonable doubt that the defendant formed the intent to kill upon, and carried it out after, deliberation and premeditation"' . . . . [Citation.]" (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306.)

Unlike provocation that is used to reduce murder to manslaughter, provocation that is used to reduce the degree of a murder does *not* have to meet an objective test. (*People v. Carasi*, *supra*, 44 Cal.4th at p. 1306; see also *People v. Padilla* (2002) 103 Cal.App.4th 675, 678; *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295.) However, "the evidence of provocation must 'justify a jury determination that the accused had formed the intent to kill as a *direct* response to the provocation and had acted *immediately* . . . .' [Citation.]" (*People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1705; see also *People v. Wickersham* (1982) 32 Cal.3d 307, 329, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 201.)

CALCRIM No. 522 is a "pinpoint" instruction, meaning that the trial court is not required to give it except on request. (*People v. Rogers* (2006) 39 Cal.4th 826, 877–880 [discussing CALJIC No. 8.73, the predecessor of CALCRIM No. 522].) Thus, the trial

court here did not err by failing to give it sua sponte. The only issue is whether defense counsel rendered ineffective assistance of counsel by failing to request it.

"""'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.]'"'' [Citations.]" (*People v. Johnson* (2016) 62 Cal.4th 600, 653.)

Here, the only arguable provocation was the killing of defendant's "homeboy." However, this did not occur *immediately* before defendant acted in response to it by shooting Boschetti. In fact, the record does not show when (or even whether) it actually happened. For all we know, it was years earlier.

Defendant therefore tries to shift the focus to Boschetti's appearing before him unexpectedly in the guise of a marijuana customer. He relies on the law that, for purposes of disproving premeditation and deliberation, provocation may be subjective; in other words, even if Boschetti's conduct would not have been provocative to a reasonable person, it was provocative to him.

It remains the case that what defendant found provocative about Boschetti, even subjectively, was that Boschetti had killed his homeboy. There was no evidence that defendant objected to Boschetti being on his turf, nor that he felt that Boschetti was disrespecting him by attempting to buy marijuana from him. Boschetti's sudden

appearance did not give defendant the *motive* for the crime; it merely gave him the *opportunity*.

Defendant's attempted shift of focus flies in the face of the rule that a murder is not mitigated merely because it is committed out of a passion for revenge. Although this rule is most often stated with regard to a reduction to manslaughter, we believe it applies to a reduction to second degree murder, also.

Regarding a reduction to manslaughter, the rationale is that revenge, by definition, implies an excessive lapse of time between the provocation and the killing. For example, in *People v. Daniels* (1991) 52 Cal.3d 815, the Supreme Court stated: "The theory that defendant was bent on revenge for having been crippled by police gunfire after [an earlier] bank robbery is insufficient to justify a manslaughter instruction. For such an instruction, the killing must be 'upon a sudden quarrel or heat of passion' [citation]; that is, 'suddenly as a response to the provocation, and not belatedly as revenge or punishment. Hence, the rule is that, if sufficient time has elapsed for the passions of an ordinarily reasonable person to cool, the killing is murder, not manslaughter.' [Citation.] The period of over two years and three months between defendant's injury and the killing of the police is, as a matter of law, sufficient to allow passions to cool. [Citations.]" (*Id.* at p. 868.)

A reduction to second degree murder, however, similarly requires that the accused must form the intent to kill as a direct and immediate response to the provocation. (*People v. Fenenbock, supra,* 46 Cal.App.4th at p. 1705.) It follows that merely seeing a

person the defendant desires revenge against cannot constitute provocation for this purpose, no matter how passionate the defendant's subjective response may be.

We accept that evidence that the defendant's motive is revenge, particularly when coupled with evidence that the defendant was not expecting to see the victim, may be relevant to disprove premeditation and deliberation. Our point, however, is that such evidence does not fall under the legal rubric of "provocation"; thus, it does not trigger CALCRIM No. 522. Not all evidence that tends to disprove premeditation is necessarily evidence of provocation.

In sum, then, there was insufficient evidence of such provocation as would require the trial court to give CALCRIM No. 522, even on request. It follows that defense counsel's failure to request it was not objectively unreasonable.

Separately and alternatively, the asserted ineffective assistance was not prejudicial. The jury was correctly instructed that defendant could not be guilty of first degree murder unless he deliberated and premeditated. CALCRIM No. 522 is deemed a pinpoint instruction — and hence it need not be given sua sponte — precisely because it merely elaborates on how the first degree murder instructions apply to the evidence. (*People v. Rogers, supra,* 39 Cal.4th at pp. 878–879.) Defense counsel's failure to request CALCRIM No. 522 did not prevent them[2] from arguing that defendant was not guilty of first degree murder because he acted impulsively in response to the sudden and unexpected appearance of the man who shot his homeboy. In fact, they did make this

[2] Defendant was represented by a team of two attorneys.

very argument.[3] It likewise did not prevent the jury from giving this argument full consideration.

We therefore conclude that defendant has not shown ineffective assistance of counsel.

III

SENATE BILL NO. 620

Defendant contends that he is entitled to a remand for resentencing in light of Senate Bill No. 620 (2017-2018 Reg. Sess.) (SB 620). The People do not argue otherwise.

As stated earlier, the jury found a firearm enhancement to be true. (Pen. Code, § 12022.53, subd. (d).) It also found lesser included firearm enhancements to be true. (Pen. Code, § 12022.53, subds. (b), (c).) Based on the greatest enhancement, the trial court imposed an additional consecutive term of 25 years to life.

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[3] "[F]or first-degree murder, the People had to have proven . . . that it was done willfully, deliberately, and with premeditation. . . . A decision to kill rashly, impulsively, without careful consideration is not deliberate and premeditated.

" . . . That person is walking up and they see someone who's killed their friend. And they're like, [']Oh my gosh. This guy killed my friend.['] And they have a talk, [']You killed my friend. No, I didn't. Yes, you did.[']

" . . . [W]ould a person who is confronted with the murderer of their friend act rashly, impulsively, without careful consideration? [¶] . . . [¶] . . .

" . . . Even if you believe that it was him, it's second, because . . . it happened quickly. He's confronted with the murderer of his friend."

Back in 2016, when defendant was sentenced, a trial court had no power to strike a firearm enhancement. (Pen. Code, former § 12022.5, subd. (c), Stats. 2011, ch. 39, § 60, p. 1736; *id*., former § 12022.53, subd. (h), Stats. 2010, ch. 711, § 5, pp. 4036-4043.) In October 2017, however, SB 620 was enacted; it became effective on January 1, 2018. (Stats. 2017, ch. 682, pp. 5104-5106.) It gives a trial court discretion to strike a firearm enhancement. (Pen. Code, §§ 12022.5, subd. (c), 12022.53, subd. (h).)

"Unless there is evidence to the contrary, courts presume that the Legislature intends for a statutory amendment reducing criminal punishment to apply retroactively in cases that are not yet final on appeal. [Citations.] This presumption is applied not only to amendments reducing a criminal penalty, but also to amendments giving the trial court discretion to impose a lesser penalty. [Citation.]" (*People v. Robbins* (2018) 19 Cal.App.5th 660, 678.) "There is nothing in the language of [SB 620] . . . indicating the Legislature intended the subdivision to be only prospective. [Citation.]" (*Id*. at p. 679.) And SB 620 went into effect before defendant's conviction became final.[4]

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[4] The path to finality has been somewhat tortuous.

Defendant filed this appeal in March 2016. In December 2017, we issued our opinion affirming the judgment in its entirety. In January 2018, defendant filed a petition for review; the Supreme Court denied it in February 2018. Thus, also in February 2018, we issued our remittitur.

In March 2018, however, defendant filed a motion to recall the remittitur so that he could raise the SB 620 issue. In May 2019, we granted that motion.

As noted, SB 620 came into effect on January 1, 2018 — after we issued our opinion, and before defendant filed his petition for review. Thus, at that time, defendant's conviction was not final.

The People have not argued that it would be an abuse of discretion to strike any of the firearm enhancements. Accordingly, we will remand with directions to consider whether to strike these enhancements. We express no opinion on how the trial court should exercise its discretion.

IV

DISPOSITION

The judgment with respect to the conviction is affirmed. The judgment with respect to the sentence is reversed, and the matter is remanded with directions to consider whether to strike any or all of the firearm enhancements. If the trial court strikes the greatest firearm enhancement, the one under Penal Code section 12022.53, subdivision (d), it must resentence defendant; otherwise, it must reimpose the same sentence.

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RAMIREZ
P. J.

We concur:

SLOUGH
J.

FIELDS
J.